NO. 89-1872

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE CITY OF SANSOM PARK, TEXAS, ET AL,

Petitioners

VS.

DANA PEELMAN

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED
BY PETITIONERS
(As Restated by Respondents)

1. Whether a United States District Court's determination that genuine issues of material fact preclude entry of summary judgment falls within the collateral order doctrine stated in Mitchell v. Forsyth?

2. Whether Petitioner Haynes is entitled to summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure?

3. Whether Petitioner McMullen is entitled to summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure?

4. Whether Petitioner City of Sansom Park is entitled to summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure?

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Dana Peelman individually, as Next of Friend to Matthew Peelman and as Community Survivor of the Estate of Bradley Peelman, Deceased, respectfully files this her Reply Brief in Opposition to the Petition for Writ of Certiorari filed in the above captioned and numbered cause.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit denying Petitioners' joint motion for rehearing, dated February 28, 1990, is attached to the Petitioners' Petition at Appendix B-1.

The Judgment and Opinion of the United States Court of Appeals for the Fifth Circuit dismissing Petitioners' appeals for want of jurisdiction, dated January 26, 1990, is attached to Petitioners' Petition at Appendix C-1.

The Judgment and Memorandum Opinion of the United States District Court for the Northern District of Texas denying Petitioners' joint motion for summary judgment, dated May 3, 1989, is attached to Petitioners' Petition at Appendix A-1.

JURISDICTION

Respondent challenges this Honorable Court's jurisdiction on the basis that the District Court's order denying Petitioners' joint motion for summary judgment due to the existence of genuine issues of material fact was not an appealable final order and that the Court of Appeal's dismissal of Petitioners' appeal establishes that this case was never "in" the Court of Appeals within the meaning of 28 U.S.C. Section 1254. C.f., Harlow v. Fitzgerald, 475 U.S. 800, 806 n.11 (1982) (noting but not reaching this issue), citing Nixon v. Fitzgerald, 457 U.S. 731, 741-742 (1982) (finding jurisdiction due to "serious and unsettled question" presented).[1]

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[1]Respondent's challenge to the Court's jurisdiction is more fully set out in the first of her Reasons for Denying the Writ, infra at page 7.

STATUTES AND RULES INVOLVED

Section 1254, Title 28, United States Code provides in relevant part as follows:

> "Cases in the court of appeals may be reviewed by the Supreme Court by the following methods:
>
> "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

Section 1291, Title 28, United States Code provides as follows:

> "The court of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title."

Rule 56 of the Federal Rules of Civil Procedure provides in relevant part:

> "(b) For Defending Party. A party against whom a claim counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without support affidavits for a summary judgment in the party's favor as to all or any part thereof.
>
> "(c) Motion and Proceedings Thereon. ... The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

STATEMENT OF THE CASE

A. Nature of Case and Disposition in Courts Below

With the exception of a few minor mischaracterizations of Respondent's claims and the alleged filing date of Respondent's reply to Petitioners' motion for summary judgment, made by Petitioners

in their "Course of Proceedings" section of the Petition (Petition for Certiorari, 3-6), Respondent would stipulate to the proceedings below described by Petitioners therein.

B. Statement of Facts

Respondent disagrees with most if not all of the facts stated by the Petitioners in their Petition. For the purposes of this proceeding, except where otherwise noted herein, Respondent would incorporate by reference the facts as stated by the Court of Appeals in its judgment and opinion below which is attached to the Petition at Appendix C-1.

REASONS FOR DENYING THE WRIT

I. The Supreme Court is without statutory authority to review the District Court's decision denying Petitioners' summary judgment and should defer to the reasonable Congressional limitation on the Supreme Court's jurisdiction imposed by 28 U.S.C. Section 1254(1).

The Petitioners seek to invoke the Court's jurisdiction under 28 U.S.C. Section 1254(1), a statute which invests the Supreme Court with authority to review cases "in" the Courts of Appeals. (Petition for Cert., 2) While Respondent does not question the Court's constitutionally derived judicial power to review a District Court's denial of a motion for summary judgment, or to review a Court of Appeals decision to dismiss for lack of jurisdiction such a decision by a District Court, Nixon v. Fitzgerald, 457 U.S. 731, 743 n.23 (1982), the Petitioners in the instant case have not

sought to invoke the Court's jurisdiction on this basis.

Although the Petitioners state that "no material issue of fact is in dispute" in this case (Petition for Cert, 28), the two courts below found, and the Petitioners themselves have previously conceded that virtually every factual allegation made by Respondent remains in dispute. (Appendix to Pet. for Cert., C-7). With the utmost respect for the Court, resolution of the many disputed issues of fact in this case, most of which turn on credibility determinations of the conflicting accounts of eye witnesses or others with personal knowledge of the events alleged, simply is not a proper responsibility for this Court to assume. For this reason Respondent respectfully urges the Court to rule that Petitioners' appeal was never "in" the Court of Appeals within

the meaning of 28 U.S.C. Section 1254(1), and in deference to the jurisdictional limitation imposed by Congress thereunder, deny the Petition for Writ of Certiorari filed by the Petitioners in this case.[2]

II. The District Court properly denied Petitioner Haynes' motion for summary judgment.

Although there exists a persuasive argument that Petitioners have failed to carry their initial burden under Fed.R. Civ.P. 56 of specifically identifying the allegations of Respondent which they maintain are not supportable by evidence,[3] in the Courts below Respondent

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[2]Harlow v. Fitzgerald, 457 U.S. 800, 806 n.11 (1982) (noting but not reaching this question); Nixon . Fitzgerald, 457 U.S. 731, 741-743 (1982) (allowing for exception to Section 1254 on the ground that a "serious and unsettled" question of law was presented).

[3]See Celotex Corp. v. Catrett, 477 U.S. 317, 328 (1986) (White, J., concurring) ("It is not enough to move for summary judgment...with a conclusory assertion that the plaintiff has no evidence to prove his case.")

nonetheless moved forward and produced sufficient evidence upon which a reasonable jury could return a verdict for Respondent, the nonmoving party below.

At the time of the decedent's unconstitutional seizure on May 14, 1987, the Fourth Amendment standard for determining when a police officer may not use deadly force to seize an individual had been decided over two years earlier by the Supreme Court's decision in Tennesses v. Garner, 471 U.S. 1 (1985). Petitioners do not dispute that Tennessee v. Garner represented clearly established law at the time of the shooting of decedent but instead contend that Petitioner Haynes "was forced to fire shots in order to protect [another officer] and members of the public who were about to be run over by the [decedent's] vehicle." (Appendix

to Pet. for Cert, C-9). The summary judgment evidence produced by Respondent, however, discloses that the decedent's truck was either stuck in the mud or rolling backwards at "two to five miles an hour;" that, according to a city councilman who witnessed the shooting, there was, prior to the shooting, "never any person placed in jeopardy of serious injury" by the decedent's actions; and, that there was never any risk of the decedent escaping and no reason for shots to have been fired according to Officer Lovelady, who, according to Petitioner Haynes, was the officer supposedly to have been in danger. (See Reply Brief of Appellee filed in the Court of Appeals, No. 89-1458, at pages 33-34).

Whether a jury should believe the eye witness testimony of a city councilman of the Petitioner City, and the eyewitness

testimony of Petitioner Haynes' partner Officer Lovelady, or should instead believe the uncorroborated testimony of Petitioner Haynes, is clearly a matter of credibililty and for a jury to decide, not the United States Supreme Court.

III. The District Court properly denied Petitioner McMullen's motion for summary judgment.

The basis upon which Respondent claims Petitioner Chief of Police McMullen should be held liable is McMullen's alleged failures to make background inquires of individuals before employing them, and to adequately train individuals hired as police officers in the constitutional limitations on the use of deadly force when seizing fleeing suspects. As to the first allegation, Respondent submitted evidence that McMullen had, prior to the shooting of decedent, provided absolutely no training

training to the officers under his command as to the constitutional limitations on the use of deadly force. Other evidence disclosed that the police personnel under McMullen's command were left with the impression that use of deadly force was constitutionally permissible whenever a suspect attempted to flee, so long as it was "after dark." Even after the shooting of Bradley Peelman, this continued to be the understanding of the police personnel employed by the Petitioner City.

> "Q. Would you tell the court and jury what you understand the conditions are that authorize a police officer to use deadly force?
>
> A. When another human being's life is in jeopardy.
>
> Q. Is that the only circumstances when you're allowed to use deadly force?
>
> A. No. That's not the only, but that's....
>
> Q. Can you tell me any others?

A. There is -- in the law, when a -- after dark and a perpetrator is fleeing, you have the discretion to use deadly force.

Q. Perpetrator. What do you mean by perpetrator?

A. Actor, a criminal.

Q. Would you define criminal for us, as you understand it to be?

A. Anyone that has broken the law.

Q. So is it your understanding then that anyone who has broken the law and it's after dark and he is fleeing from a police officer, that you're authorized to use deadly force incident to preventing that person from fleeing?

A. That's my interpretation." (Deposition Testimony of Officer Lovelady, R.3,513-514).

Under McMullen's command, supplemental training was up to the discretion of the individual officer, and was not a requisite for continued service as a police officer (McMullen, R.3,0485). While it is clear the personnel under McMullen's command were inadequately trained in the proper use of deadly

force, and the shooting of Bradley Peelman was contrary to the constitutional restraints established in the Garner decision, McMullen continues to maintain Haynes' use of deadly force "was completely justified" since, according to McMullen, Haynes was not likely to have been convicted of a criminal offense under Texas Penal Code Section 9.33. Under Texas law, Section 9.33 is merely "a defense to prosecution," and does not "abolish or impair any remedy for the conduct that is available in a civil suit." See Texas Penal Code Sections 9.02, and 9.06 (Vernon). Thus, under the standard of training maintained by Chief McMullen, indictable conduct is "completely justified" because of this statutory defense.[4]

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[4]Petitioner Haynes was indicted for murder by a Tarrant County, Texas, Grand Jury as a result of decedent's death but was subsequently acquitted.

As with most other policies of the Sansom Park Police Department, the policy, or rather lack of policy with respect to the manner in which background checks of applicants for jobs at the police department were supposed to be conducted, was the responsibility of Petitioner McMullen. (R.3,0442-0443).

Although McMullen purports to have established a screening procedure, his additional testimony brings into question not only whether the policy was followed in Petitioner Haynes case, but also whether such a procedure exists at all. McMullen initially testified he delegated the responsibility for investigating Haynes' background to Officer Cauldron (R.3,463); that despite having been informed that Haynes had "had some problems" at the North Richland Hills Department at which Haynes previously

worked (R.3,461), this information was "nothing to take stock in" (R.3,464); and, that no information whatsoever was obtained from North Richland Hills because Cauldron never contacted that police department when "investigating" Haynes' background. (R.3,463). The foregoing statements, while internally inconsistent in and of themselves, are even more difficult to square with McMullen's more recent contention that "[a] background inquiry at North Richland Hills Police Department" was conducted and that this "reflected no negative information about Haynes."

The Deposition upon Written Questions and the oral deposition of Randy Shifflet, Captain of the North Richland Hills Police Department, and the oral deposition of Ron McKinney, Director of Personnel of the City of North Richland

Hills, reflect that no formal request for information was made of Shifflet or McKinney by anyone from the City of Sansom Park relative to Haynes' employment with North Richland Hills and that if even a casual inquiry were to have been made of Shifflet or McKinney, the inquirer would have been advised that no information could be released without a written authorization from Haynes. No such authorization was ever submitted to or received by the City of North Richland Hills and no information was furnished to the City of Sansom Park. Had such written authorization been received, according to these witnesses, the entire personnel record of Haynes would have been made available to the City of Sansom Park or its delegated policy-maker or investigator for its consideration in determining whether to employ Haynes, and

obtain from the state of Texas a commission for Haynes to enforce the law and carry a lethal weapon incident thereto on behalf of the City. (R.4,707-722). These records reflect that the City of North Richland Hills, having concluded that Officer Haynes "pose[d] a serious liability to the Department" (R.4,717), terminated Petitioner Haynes from his position as a police officer as a result of multiple incidents wherein Haynes used or threatened to use deadly force without any discernible justification whatsoever.

Based on the foregoing evidence, Plaintiff submits that a reasonable jury could conclude that no investigation of Haynes background was conducted and that the Chief's failure to see to it that this was done demonstrated a deliberate indifference to the constitutional rights

of persons whom his police personnel would likely come in contact, and that McMullen's acts or omissions constituted a substantial factor or cause of decedent's death.

Respondent believes this and other evidence presented by her raises a triable issue of fact, as the District court and Court of Appeals each held below.

IV. The District Court properly denied Petitioner City of Sansom Parks motion for summary judgment.

Predicated on prior circuit precedent, the Court of Appeals in a footnote to its opinion held that it was without jurisdiction to consider the appeal of Petitioner City of Sansom Park. See Appendix to Pet. for Cert. C-10 n.3. The Court of Appeals was surely correct in this regard, as another Court of Appeals has also recently held. Valdez v. City

and County of Denver, 878 F.2d 1285, 1287 n.2 (10th Cir. 1989). For the purpose of assuring the Supreme Court that the District Court properly denied the Petitioner City's motion for summary judgment however, Respondent would offer the following summary of the evidence submitted by Respondent to support her allegation of municipal liability.

Under 42 U.S.C. Section 1983, identification of municipal policymakers with final policymaking authority is a matter of local law and is for the Court presiding over the Section 1983 litigation to determine as a question of law. Jett v. Dallas Ind. School District, ___ U.S. ___, 105 L.Ed.2d 598, 628, 109 S.Ct. 1197, ___ (1989). In the present case the Petitioner City has expressly identified Chief of Police McMullen as having been delegated final

policymaking authority over operation of the police department, including but not limited to the hiring and training of police officers employed by the Petitioner City. (First Amended Original Answer of Defendant City of Sansom Park, paragraph 6). In light of the evidence submitted in connection with Respondent's supervisory liability claims against Chief McMullen in his personal capacity, some of which has been disclosed at pages 12-19, supra, it is clear that, given McMullen's undisputed official capacity as policymaker for the City with regard to the deficiencies alleged, the District Court correctly ruled that a genuine issue of fact exists, and that "it is for the jury to determine whether [McMullen's] decisions...caused the deprivation[s]" Respondent has alleged. Jett v. Dallas Ind. School District,

supra, 105 L.Ed.2d at 628, 109 S.Ct. at _____.

CONCLUSION

For the foregoing reasons, Respondent prays that the Petition for Writ of Certiorari filed in this case be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing instrument have been set via U.S. Mail,

certified, return receipt requested, on this the 8th day of June, 1990, to:

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